1950

Wycoff Company, Inc. v. Public Service Commission of Utah and Roy Hill dba Seamons Truck Line : Brief of Defendants

Utah Supreme Court

Stewart, Cannon & Hanson; E. F. Baldwin, Jr.; Attorneys for Defendants;

7409

7410

Cases Nos. 7409 and 7410

IN THE SUPREME COURT
of the
STATE OF UTAH

WYCOFF COMPANY, INCORPORATED,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF UTAH and ROY HILL, d/b/a SEAMONS TRUCK LINE,

Defendants.

BRIEF OF DEFENDANTS

STEWART, CANNON & HANSON
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STATEMENT OF FACTS

While we substantially agree with the plaintiff's statement of the evidence relating to the hearing on the cases involved, we are not in accord with plaintiff's conclusions with respect thereto. We will therefore give our version of that part of plaintiff's statement of facts which is controverted by the defendant.

In referring to the record, the defendant will cite

the page number at the lower righthand corner.

The contract entered into by the Northwestern Express Company, Inc. with D. W. Harris, Manager of the Orpheum Theatre, Tremonton, Utah, on April 7, 1947, was executed prior to April 24, 1947, when the alleged rights of the said Northwestern Express Company, Inc. were reinstated by the Public Service Commission. The plaintiff never did receive authority from the commission to provide service under this agreement (R. 147, 148), nor is there any evidence in the record that the plaintiff ever served D. W. Harris under said contract.

There was no reason to notify the Northwestern Express Company, Inc. or its principal stockholder, Milton Wycoff, of the hearing on defendant Hill's application to serve the Liberty and Orpheum Theatres on April 16, 1947, as at that time not only had the contracts previously held by the Northwestern Express Company, Inc. ceased to exist, but the rights of the company, if any, had not been reinstated. The date of the reinstatement order was April 24, 1947. Said company had not been in operation since January 27, 1944. There were no protests filed by plaintiff to either the Public Service Commission's order of July 9, 1947, authorizing service to said theatres by the defendant Hill, or to its order of January 9, 1948, authorizing the defendant to serve the Main Theatre in Garland. If plaintiff felt that by not having received notice of said hearing his rights were infringed, his remedy was to protest to the com-

mission and demand that the issues be formally heard. This was never done.

The lease between Melba H. Seamons and Roy Hill provided that the operating rights of the Seamons Truck Line should be leased to Roy Hill (R. 93). It is correct that at the time of the execution of said lease the operating rights were "contract rights." However, the agreement provided that all operating rights obtained by the lessee, Roy Hill, should revert to the lessor. The parties interpreted this clause to refer to any rights acquired by Hill during the term of the lease, whether contract motor carrier or common motor carrier. Melba Seamons, the lessor, testified at the hearing in support of the defendant's application (R. 106-107). The application of the defendant filed on May 21, 1948, for common motor carrier authority (R. 1, Case No. 7410, Vol. 2) states that "applicant is an individual operating under the name and style of the Seamons Truck Line. Contract carrier rights are leased from Mrs. Melba Seamons," which duly apprised the commission that he was applying as the lessee of said contract rights.

While the defendant was serving the Orpheum Theatre at Tremonton and the Main Theatre at Garland, pursuant to authority from the commission, the ownership of these theatres became vested in the Allied Theatre Company, of which change the defendant had no notice until he received a demand from Milton Wycoff, president of the plaintiff corporation, to give him the

keys to the theatres because said company had a contract from said Allied Theatre Company. At the time the Allied Theatres had been in existence "a couple of months" (R. 154).

The contract obtained by the plaintiff provided that he would carry double feature films for $2.50 (R. 155), which was 50c cheaper than the defendant had carried such film (R. 52). When the defendant learned of the plaintiff's contract he secured a new contract from Jorgenson, president of the Allied Theatres Company, wherein he agreed to carry double feature film at the reduced rate of $2.50 in order to meet Wycoff's rate (R. 54).

The application of plaintiff for common carrier authority over regular routes from Salt Lake City, Utah, to the Utah-Idaho line of U. S. Highways 91 and 89, serving the off-route points of Lewiston and Hyrum, covered the territory in which the defendant Hill was serving every theatre with the exception of two which were government owned (R. 39). It is interesting to note that not one theatre owner from this territory or the Tremonton-Garland area appeared at the hearing in support of the plaintiff's application for contract motor carrier authority or common motor carrier authority.

On page 10 of his brief the plaintiff quotes testimony of the defendant Hill from the record to show the lack of need for a common carrier. The following testimony on this point should be considered, with the testimony quoted:

"Q. Now, at the time you obtained temporary authority to operate as a contract carrier for the theatres in Tremonton and Garland in 1947, was any one else delivering film to those theatres at that time besides the Express Company?

"A. No.

"Q. And your application as lessee of Mrs. Seamons' operating rights is to serve as a common carrier all the same people that you are now serving as a contract carrier?

"A. That's right.

"Q. Which will increase your responsibility to the public and subject you further to the jurisdiction of this Commission?

"A. That's right.

"Q. In a sense you have been operating as a common carrier heretofore, have you not?

"A. Contract carrier.

"Q. I say, in a sense you have been operating as a common carrier?

"A. That's right.

"Q. In that you have been serving all the theatres in the district in which you propose to operate?

"A. That's right."

Mr. McMahon, who appeared in support of plaintiff's application was only one of twelve or thirteen film distributors operating in Salt Lake City, Utah (R. 130). His testimony in substance was that there were

times when it was necessary to send out film to theatres on special trips; that on these occasions he had used the Wycoff Company and also the defendant Hill (R. 130). His testimony on the type of service furnished by the defendant Hill is quoted verbatim as follows:

"Q. Have you had occasions in times past to have Mr. Roy Hill make special trips for you?

"A. I believe Mr. Hill made a trip for us last week to Tremonton.

"Q. And has Mr. Hill ever refused to make a special trip for you?

"A. Never at any time.

"Q. Have you been satisfied with Mr. Hill's service in the past for your company?

"A. He has done a very good job and he has made mistakes, like everybody else has made.

"Q. Have you ever had any complaints of Mr. Hill's service in any of the theatres?

"A. Not any definite complaints. He has had mistakes happen.

"Q. And Mr. Wycoff has had his?

"A. That's right.

"Q. And by and large, Mr. Hill has done a very good job for you?

"A. That's right."

ARGUMENT

Plaintiff's contentions, as set out in his statement of points, must be considered in the light of Section 76-6-17, U.C.A. 1943, which provides that the findings and conclusions of the commission on questions of fact

shall be final and shall not be subject to review. It has repeatedly been held that in reviewing cases certified to the court from the Public Service Commission, the review is limited to ascertain whether or not the commission had before it substantial evidence upon which to base its decision, and that only in the event that the commission acted arbitrarily, capriciously or unreasonably, can the order be set aside. *Goodrich v. Public Service Commission of Utah,* 198 Pac. (2d) 975.

I.

THE EVIDENCE JUSTIFIED THE COMMISSION'S ORDER DENYING PLAINTIFF'S CONTRACT MOTOR CARRIER APPLICATION TO SERVE THE TWO THEATRES INVOLVED.

The defendant had satisfactorily served the Orpheum Theatre at Tremonton under a permanent contract carrier permit since July 9, 1947, and had served the Main Theatre at Garland under permanent contract authority since January 9, 1948. Before these dates he served both theatres under temporary permits issued by the commission and was so serving said theatres when Milton Wycoff, president of plaintiff corporation, obtained a contract from the Allied Theatre Company by cutting the prices for double feature films from $3.00 to $2.50 per change (R. 54). When Jorgenson, the president of the Allied Theatres Company, learned that Hill would meet Wycoff's rate, he gave Hill a contract (R. 51), indicating that Hill's service had been satisfactory. It is significant that Jorgenson did not

appear at the hearing in support of plaintiff's application.

The plaintiff's claim for authority was based upon contract permit No. 241, issued the Northwestern Express Company, Inc. in 1939, wherein the commission granted authority to serve contractees who were managing the three theatres at that time. These contracts had long ceased to exist. The theatres were under a different ownership when the defendant started serving them. It is the defendant's contention that when the contract ceased to be in effect, the authority of the plaintiff's predecessor to serve the contractees ceased, as there was no further reason for the authority. Plaintiff's contention that the reinstatement order of April 24, 1947, reactivated the right to serve theatres in Tremonton and Garland really amounts to an assertion that a contract carrier's authority is as extensive as that of a common carrier. If plaintiff's position is correct, the result would be to make every contract carrier a common carrier, with the right to select only those customers whom he would serve and to refuse to serve the public generally. Such a situation certainly would not benefit the general interest of the public in efficient service. The common carrier, being left with only the unprofitable part of the service, would soon be out of business.

It is interesting to note that although the plaintiff contends that it is not necessary to petition the commission to serve new contractees after a permit has once been granted, that in this case he did exactly that

by filing his petition for contract authority. Also, why did plaintiff obtain a new contract with the Allied Theatres Company if he felt his rights under the old contracts were still in existence? The commission's order of April 24, 1947, reinstating the rights of the Northwestern Express Company, Inc., merely reactivated those rights *still existing* and permitted the defendant to operate over the same routes and with the same restrictions. Undoubtedly this company had other rights under suspension which the plaintiff acquired when the assets were purchased, but the commission could not reinstate rights based on contracts that were no longer in existence.

There is no evidence of other contracts secured by plaintiff with the parties who operated the theatres covered by the original contracts filed in 1939, after said reinstatement order of April 24, 1947, as contended on page 16 of the plaintiff's brief. The commission by its order denying the plaintiff contract carrier authority, merely decided that the defendant should continue to serve the same two theatres of the common carrier that he had served in the past as a contract carrier. There are only three theatres to be served in the Garland and Tremonton area, and the commission, by its order, determined that the interests of these theatre operators could best be served by one common carrier than by two contract carriers. If plaintiff's petition to serve two of the theatres had been granted, the defendant still would have been required to serve the one theatre that had not contracted with the plaintiff, the result of which

would compel him to serve the same territory with a two-thirds decrease in the available business and resulting loss of revenue, which would eventually cause defendant to discontinue entirely his service to the Tremonton and Garland area.

The commission, in the interest of the general public, may regulate contract carriers to the same extent as it does common carriers (Sec. 76-5-24, U.C.A. 1943). In the case of *Goodrich v. Public Service Commission,* supra, this court refused to set aside an order of the commission denying the carrier authority to serve four additional contractees who appeared at the hearing in support of the carrier's petition, upon the ground that such would result in financial loss to the existing common carrier, to the detriment of the welfare of the public in the area to be served. This decision is also authority that a contract carrier is not authorized to serve additional contractees upon securing a contract, but must also petition the commission for authority to furnish such additional service.

II.

THE COMMISSION ACTED LEGALLY IN GRANTING COMMON MOTOR CARRIER AUTHORITY TO THE DEFENDANT, WHO WAS LESSEE OF THE OPERATING RIGHTS, AND MELBA SEAMONS.

There is nothing in the Utah statutes defining the power of the Public Service Commission stating that a lessee of contract authority cannot apply for common carrier authority. The commission permitted the defen-

dant to lease the operating rights of Melba Seamons under a five year contract on April 15, 1947. There was some attempt at the hearing on the part of plaintiff to becloud the issues by asserting that Roy Hill was applying for common carrier authority in his own name, to the detriment of the lessor, Melba Seamons. However, this contention was answered when Mrs. Seamons appeared as a witness in support of her brother's petition. The lease contract between her and the defendant is no concern of the plaintiff. The only issue before the commission was whether or not granting common carrier authority to the defendant was in the public interest, which it decided in the affirmative. Mrs. Seamons stated that she favored the granting of defendant's petition (R. 106-107). At the end of the lease, if it is not renewed, this authority would revert to the lessor, subject to the approval of the commission. The public is adequately protected by the statutory power of the commission to revoke the operating rights of any carrier when the public welfare requires it.

The evidence established that the commission was within its authority in granting defendant's petition to operate as a common carrier. Granting that plaintiff is correct in its assertion that there were no witnesses who testified on the need for a common carrier, there were also no protestants, other than the plaintiff, who were interested as a petitioner for the same authority. The situation here is different from that in *McCarthy v. Public Service Commission,* 184 Pac. (2d) 220, wherein the Denver & Rio Grande Western Railroad Company,

an existing common carrier, protested the granting of common carrier authority to a number of independent truckers, who had previously operated as contract carriers of gravel. In this case the evidence is conclusive that the defendant served every theatre in the territory which he proposed to serve as a common carrier, other than two government owned theatres (R. 39), whereas plaintiff served no theatres in this territory (R. 151). There were no complaints on service from any shipper served by the defendant. The only witness who appeared at the hearing was Mr. McMahon, and his testimony was as favorable toward the defendant as it was toward the plaintiff (R. 131). At the hearing Mr. Wycoff did say that every exchange manager in Film Row would testify in support of his petition (R. 140), but Mr. McMahon was the only one who appeared.

The principal reason the plaintiff gave in support of its contention that it was better qualified to operate as a common carrier than the defendant Hill was that it had more trucks operating than defendant; that it operated five regular schedules north out of Salt Lake City, Utah in interstate commerce; that occasionally it was necessary for plaintiff to make special trips to haul film to territories served by the defendant; however, Mr. Wycoff had no records of such special service (R. 171). The defendant Hill testified that he was in a position to make special trips when necessary and had done so in the past (R. 89).

Defendant contends that under the situation exist-

ing, wherein he was satisfactorily serving every theatre as a contract carrier in the territory, which he petitioned to serve as a common carrier, that the general public is better served by him as a common carrier than as a contract carrier. As a common carrier he has a mandatory duty to serve the public generally instead of just those individuals with whom he has contracts. Also, as a common carrier, he must submit to more detailed tariff regulation by the commission, which is in the public interest, particularly when his operation serves every privately owned theatre in northern Utah.

There is very little difference in the requirements to obtain a certificate of convenience and necessity to operate as a common motor carrier (see Sec. 76-5-18, U.C.A. 1943) and the requirements to operate as a contract motor carrier (see Sec. 76-5-21, U.C.A. 1943, as amended by Section 3, Chapter 105, page 209, Laws of Utah 1945). In the former, the commission must be satisfied with the applicant's financial ability to render this service. In the latter this requirement is lacking.

There was no claim by plaintiff that defendant's financial ability to serve as a common carrier was insufficient. Therefore, it would seem that if the defendant were qualified to act as a contract motor carrier, that he was qualified to serve as a common motor carrier and the commission felt that the public would benefit, if he were granted common motor carrier authority. The evidence was that the plaintiff had forty-two trucks, thirty-eight to forty-two employees, and carried nearly

all the film from Salt Lake City to Southern Utah (R. 138, 139). Granting it common carrier authority in Northern Utah would result in plaintiff obtaining a virtual monopoly on the carriage of all film in the state of Utah, which, we submit, is not conducive to the best interests of the public generally.

Mr. Wycoff's contention that his company desires authority only to serve theatre owners in Northern Utah in time of emergencies is a subterfuge by which he hopes to eventually take over the operations of the defendant. If plaintiff's petition for common carrier authority is granted, the defendant can expect the type of competition shown by plaintiff when he cut-rates to the Allied Theatre Company to obtain a contract from it.

CONCLUSION

The defendant respectfully submits that there was sufficient evidence to sustain the order of the commission granting common motor carrier authority to the defendant and denying the petition of the plaintiff for such authority, that the order of the commission denying authority to the plaintiff to operate as a contract carrier to the theatres in Tremonton and Garland should likewise be affirmed.

Respectfully submitted,

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